

**REDACTED DECISION – DOCKET NO. 11-265 RP – BY A.M. “FENWAY” POLLACK,
CHIEF ADMINISTRATIVE LAW JUDGE – SUBMITTED FOR DECISION ON
NOVEMBER 10, 2012 – ISSUED ON APRIL 30, 2012**

SYNOPSIS

TAXATION -- SUPERVISION -- GENERAL DUTIES AND POWERS OF COMMISSIONER -- It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION COLLECTION OF TAX -- “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION -- COLLECTION OF TAX -- Whenever a taxpayer has a refund or credit due it for an overpayment of any tax, the Tax Commissioner may reduce the amount of the refund or credit by the amount of any tax, which is owed by the same taxpayer. *See* W. Va. Code Ann. § 11-10-11(j)(1) (West 2010)

TAXATION -- PROCEDURE AND ADMINISTRATION -- LIENS -- In West Virginia, state tax liens shall continue until the liability for the tax, additions to tax, penalties and interest is satisfied or upon the expiration of ten years from the date the tax, additions to tax, penalties and interest are due and payable or the date the tax return is filed, whichever is later. *See* W. Va. Code Ann. § 11-10-12(b) (West 2010).

TAXATION -- PROCEDURE AND ADMINISTRATION -- LIENS -- Any tax, additions to tax, penalties or interest due and payable to the state of West Virginia shall be both a personal obligation of the taxpayer and shall be a lien upon their real and personal property. *See* W. Va. Code Ann. § 11-10-12(a) (West 2010).

AMERICAN JURISPRUDENCE -- LIENS -- “Although a lien is an incident of, and inseparable from, the debt it secures, it is distinct from that debt; liens relate to assets or collateral, while the indebtedness underlying a lien appertains to a person or legal entity (the debtor).” 51 Am. Jur.2d Liens §13 (2011).

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- The Petitioner’s unpaid 1998 tax liability is a personal obligation of the Petitioner, as that term is used in West Virginia Code Section 11-10-12(a). This personal obligation has not been extinguished due to the statutory expiration of the lien filed by the Tax Commissioner on December 30, 1999.

TAXATION -- PROCEDURE AND ADMINISTRATION -- LIMITATIONS ON COLLECTION -- “Every proceeding instituted by the tax commissioner for the collection of the amount determined to be due . . . irrespective of whether such proceeding shall be instituted in a court or by utilization of other methods provided by law for the collection of such tax, additions to tax, penalties or interest, shall be brought or commenced within ten years after the date on which the taxpayer filed the annual return” W. Va. Code Ann. § 11-10-16(b) (West 2010)

WEST VIRGINIA SUPREME COURT OF APPEALS -- STATUTORY CONSTRUCTION -- “[T]he fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning.” Syl. Pt. 4, Davis Mem’l Hosp. v. W. Virginia State Tax Com’r, 222 W. Va. 677, 671 S.E.2d 682 (2008) (internal citations omitted).

WEST VIRGINIA SUPREME COURT OF APPEALS -- STATUTORY CONSTRUCTION -- “[W]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation” *Id.*

WEST VIRGINIA SUPREME COURT OF APPEALS -- STATUTORY CONSTRUCTION -- “[A] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Id.*

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- West Virginia Code Section 11-10-16(b) is clear and unambiguous with regards to the question of whether the terms “proceeding instituted by the tax commissioner,” “utilization,” “method,” “brought” and “commenced” apply to the Tax Commissioner’s day to day duties in administering West Virginia’s tax laws.

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- Reasonable minds cannot disagree that the ten year limitations period contained in West Virginia Code Section 11-10-16(b) does not apply to administrative actions undertaken by the Tax Commissioner pursuant to West Virginia Code Section 11-10-11(j)(1).

WEST VIRGINIA SUPREME COURT OF APPEALS -- STATUTORY CONSTRUCTION -- “[T]he canon of statutory construction *noscitur a sociis*, states that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it.” Davis Mem’l, at 689, 684 n11.

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- Assuming arguendo that West Virginia Code Section 11-10-16(b) is ambiguous, under the canon of statutory construction *noscitur a sociis*, the “other methods” contemplated by the legislature when drafting Section 16(b) are akin to “court like” actions taken by the Tax Commissioner, like those of levy and distraint, as opposed to his or her day to day duties in administering the tax laws of West Virginia.

TAXATION -- WEST VIRGINIA OFFICE OF TAX APPEALS -- HEARING PROCEDURES -- In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003)

WEST VIRGINIA OFFICE OF TAX APPEALS -- CONCLUSION OF LAW -- BURDEN OF PROOF MET -- The Petitioner in this matter has not carried his burden of proving that the June 13, 2011, Notice of Return Change/Credit Denial was erroneous, unlawful, void or otherwise invalid.

WEST VIRGINIA OFFICE OF TAX APPEALS -- RULING -- Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Notice of Return Change/Credit Denial, issued against the Petitioner on June 13, 2011, regarding \$_____ of his 2010 tax year overpayment, is hereby **AFFIRMED**.

FINAL DECISION

On June 13, 2011, the Taxpayer Services Division of the West Virginia State Tax Commissioner's Office (hereinafter, Tax Department or Respondent) issued a Return Change Notice to the Petitioner. This Notice informed the Petitioner that his 2010 tax return had been adjusted, and that as a result, his \$_____ overpayment had been reduced to \$_____. The Respondent made this adjustment in order to apply the remainder of the overpayment, \$_____, to an outstanding tax debt of the Petitioner's.

The Petitioner filed his Petition with this Tribunal on July 26, 2011. In his Petition, he requested that the diverted \$_____ be immediately restored, so that it could be applied as a credit against the Petitioner's 2011 state tax liabilities¹. Additionally, the Petitioner requested that the Respondent be prohibited from assessing additions to his 2011 tax liabilities, as a result of any failure to have the proper amount of estimated payments credited to his account. Subsequently,

¹ The net result of the Respondent's Notice of Return Change was to deny the Petitioner a credit against his 2011 taxes. For jurisdictional purposes this Tribunal has treated the Notice as a credit denial, pursuant to West Virginia Code Section 11-10A-8(2).

the parties agreed to have this matter decided by dispositive motions and the matter became ripe for a decision on November 10, 2011.

1. In 1999 the Petitioner filed a 1998 West Virginia Nonresident/Part-Year Resident personal income tax return. However, the record is unclear as to whether the Petitioner failed to remit any of the taxes due, or whether he failed to remit the proper amount. In any case, it is undisputed between the parties that the Petitioner has an unpaid tax liability for tax year 1998.

2. On December 30, 1999, the Respondent filed a tax lien with the County Clerk of A West Virginia County, indicating a tax debt on the part of the Petitioner. The amount of the lien was \$_____.

3. The Petitioner also failed to remit the proper amount of tax due for tax years 1999 and 2005.

4. In tax year 2009 the Petitioner had an overpayment of \$_____.

5. In his tax filing in 2010, the Petitioner elected to have this overpayment applied to his 2010 tax liabilities.

6. By a letter dated September 8, 2010, the Respondent indicated that he had intercepted \$_____ of this overpayment and applied it to the Petitioner's outstanding tax debts of previous years.

7. The Petitioner complained to the Tax Department that applying any portion of this money to his 1998 tax liability was unlawful because the December 1999 lien filed in a West Virginia County had expired.

8. As a result of this complaint, the Tax Department refunded \$_____ to the Petitioner, however, the Petitioner requested that this amount be credited towards his 2010 tax liabilities.

9. In tax year 2010, the Petitioner again had an overpayment, in the amount of \$_____.

10. Once again, the Respondent intercepted a portion of the overpayment, \$_____, and applied it to the Petitioner's 1998 outstanding tax liability.

11. Once again, the Petitioner complained that his 1998 tax liability had been extinguished by the expiration of the 1999 lien.

12. This time the Respondent/Tax Department refused to return the intercepted monies and this appeal followed.

DISCUSSION

The general law of this matter is clear and unambiguous. "The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. § 11-10-11(a) (West 2010). Subsection (j) of Article 10 applies directly to the facts of this case, and states:

Whenever a taxpayer has a refund or credit due it for an overpayment of any tax administered under this article, the Tax Commissioner may reduce the amount of the refund or credit by the amount of any tax administered under this article, whether it be the same tax or any other tax, which is owed by the same taxpayer and collectible as provided in subsection (a) of this section.

W. Va. Code Ann. § 11-10-11(j)(1) (West 2010).

The problem in this case is the Petitioner alleges that he no longer owes his unpaid 1998 tax liability. He alleges as such on two grounds, the first being that at the time the Tax Commissioner diverted his 2010 overpayment, it had been more than ten years since the Petitioner had filed his 1998 tax return, the result being that his tax debt had expired. Second, by

statute, the Tax Commissioner had ten years to institute a proceeding to collect the unpaid 1998 taxes, and he failed to do so. These arguments will be addressed in order.

The Petitioner first relies on West Virginia Code Section 11-10-12, the subject of which is tax liens. Section 12 clearly states what the Petitioner asserts, that in West Virginia state tax liens:

shall continue until the liability for the tax, additions to tax, penalties and interest is satisfied or upon the expiration of ten years from the date the tax, additions to tax, penalties and interest are due and payable under section eight of this article or the date the tax return is filed, whichever is later

W. Va. Code Ann. § 11-10-12(b) (West 2010). Here, the tax return at issue was filed in April of 1999. As such, the lien created by the Petitioner's failure to remit the proper amount in 1998 clearly was more than ten years old at the time the Respondent diverted the 2010 overpayment. However, rather than presenting any authority for the proposition that expiration of the lien extinguishes his tax liability, the Petitioner merely presents it as a foregone conclusion. In actuality, it is fairly well settled that a debt and the lien to secure it, while related, are not one and the same. In fact, Section 12(a) of Article 10, Chapter 11, found directly above the section relied on by the Petitioner, stands for this proposition.

Any tax, additions to tax, penalties or interest due and payable under this article or any of the other articles of this chapter to which this article is applicable shall be a debt due this state. It shall be a personal obligation of the taxpayer and shall be a lien upon the real and personal property of the taxpayer

Id at 12(a). Section 12(a) clearly and unambiguously creates two situations for unpaid tax liabilities; they are a personal obligation of a taxpayer **and** a lien upon the taxpayer's real and personal property. The language of Section 12(a) mirrors the general legal doctrine regarding debts and liens. "Although a lien is an incident of, and inseparable from, the debt it secures, it is

distinct from that debt; liens relate to assets or collateral, while the indebtedness underlying a lien appertains to a person or legal entity (the debtor).” 51 Am. Jur.2d Liens §13 (2011); *See also Daughters of Charity Health Services of Waco v. Linnstaedter*, 226 S.W.3d 409, 411 (Tex.,2007) (A lien is part and parcel of the underlying claim, the former existing only because of the latter); *S.D. Deacon Corp. of Washington v. Gaston Bros. Excavating, Inc.*, 150 Wash.App. 87, 89-90, 206 P.3d 689, 691 (Wash.App. Div. 1,2009) (A lien is an encumbrance on property to secure payment of a debt.).

Here, it is undisputed between the parties that the Petitioner has an outstanding tax liability for tax year 1998. While the lien to secure that debt may have expired, the debt itself is separate and distinct from the lien and is still a personal obligation of the Petitioner, as that term is used in West Virginia Code Section 11-10-12(a).

The Petitioner also argues that the Tax Commissioner, by statute, has ten years to collect the debt created by the Petitioner’s unpaid 1998 taxes. The Petitioner relies on West Virginia Code Section 11-10-16, which states:

Where assessment is not issued.--Every proceeding instituted by the tax commissioner for the collection of the amount determined to be due by methods provided by law other than the issuance of an assessment, of any tax, additions to tax, penalties or interest imposed by this article or any of the other articles of this chapter to which this article is applicable, irrespective of whether such proceeding shall be instituted in a court or by utilization of other methods provided by law for the collection of such tax, additions to tax, penalties or interest, shall be brought or commenced within ten years after the date on which the taxpayer filed the annual return required to be filed by any of the articles of this chapter and, if no annual return is required, such ten-year period shall begin on the day after the latest periodical return required to be filed in any year is filed

W. Va. Code Ann. § 11-10-16(b) (West 2010). Once again, the Petitioner’s argument suffers from the same infirmity discussed above. The Petitioner never provides any authority, or even

argument regarding how the Tax Commissioner's diversion of an overpayment, pursuant to West Virginia Code Section 11-10-11(j), is a "proceeding instituted by the tax commissioner" by "utilization" of a "method" and that has been "brought" or "commenced" as those terms are used in Section 16(b). Taking the words at their common ordinary meaning and utilizing the rules of statutory construction dictates the opposite conclusion.

The laws of statutory construction are even better settled than the law of liens discussed above. The West Virginia Supreme Court of Appeals has stated:

where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation. . . . a statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning. . . . the fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning

Syl. Pt. 4, Davis Mem'l Hosp. v. W. Virginia State Tax Com'r, 222 W. Va. 677, 671 S.E.2d 682 (2008) (internal citations omitted). Here, the parties clearly disagree about the meaning of West Virginia Code Section 11-10-16(b). However, as pointed out by the Davis Court, that alone does not create an ambiguity. Rather, the question becomes, can reasonable minds disagree as to whether the Tax Commissioner's actions in this matter fall under the ten-year limitation provisions of Section 16(b). This Tribunal rules that reasonable minds cannot disagree on that question. As stated above, the Tax Commissioner's actions in this matter fell under the purview of West Virginia Code Section 11-10-11(j)(1), which allows him or her to, after an overpayment, reduce the ensuing refund or credit by the amount of any other tax owed by the Taxpayer. This action is part and parcel of the thousands of administrative actions undertaken by the Tax Commissioner and his employees every day. To call this action a "proceeding instituted by the

tax commissioner” by “utilization” of a “method” and that has been “brought” or “commenced” belies the plain meaning of the quoted words. Simply put, all of those terms indicate the need for an affirmative action on the part of the Tax Commissioner, as opposed to his or her day to day administrative functions. Additionally, the words “brought” or “commenced” indicate a process that has a beginning and an end, like a court proceeding or more pertinently, like the powers of levy and distraint, which the Tax Commissioner possesses pursuant to Section 13 of Article 10, Chapter 11. Here the Tax Commissioner did not commence or bring a proceeding.

Even if Section 16(b) is ambiguous, our analysis is bolstered by the canon of statutory construction *noscitur a sociis*, which states that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it. Davis Mem’l, at 689, 684 n11. Here, West Virginia Code Section 11-10-16(b) states that the proceeding in question shall be instituted in a court, or by utilization of other methods. The canon of *noscitur a sociis* bolsters our ruling that the “other methods” contemplated by the legislature when drafting Section 16(b) are akin to “court like” actions taken by the Tax Commissioner, like those of levy and distraint, as opposed to his or her day to day duties in administering the tax laws of West Virginia.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

2. “The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable.” W. Va. Code Ann. § 11-10-11(a) (West 2010).

3. Whenever a taxpayer has a refund or credit due it for an overpayment of any tax, the Tax Commissioner may reduce the amount of the refund or credit by the amount of any tax, which is owed by the same taxpayer. *See* W. Va. Code Ann. § 11-10-11(j)(1) (West 2010)

4. In West Virginia state tax liens shall continue until the liability for the tax, additions to tax, penalties and interest is satisfied or upon the expiration of ten years from the date the tax, additions to tax, penalties and interest are due and payable or the date the tax return is filed, whichever is later. *See* W. Va. Code Ann. § 11-10-12(b) (West 2010).

5. Any tax, additions to tax, penalties or interest due and payable to the state of West Virginia shall be both a personal obligation of the taxpayer and shall be a lien upon their real and personal property. *See* W. Va. Code Ann. § 11-10-12(a) (West 2010).

6. “Although a lien is an incident of, and inseparable from, the debt it secures, it is distinct from that debt; liens relate to assets or collateral, while the indebtedness underlying a lien appertains to a person or legal entity (the debtor).” 51 Am. Jur.2d Liens §13 (2011).

7. The Petitioner’s unpaid 1998 tax liability is a personal obligation of the Petitioner, as that term is used in West Virginia Code Section 11-10-12(a). This personal obligation has not been extinguished due to the statutory expiration of the lien filed by the Tax Commissioner on December 30, 1999.

8. “Every proceeding instituted by the tax commissioner for the collection of the amount determined to be due . . . irrespective of whether such proceeding shall be instituted in a court or by utilization of other methods provided by law for the collection of such tax, additions to tax, penalties or interest, shall be brought or commenced within ten years after the date on which the taxpayer filed the annual return” W. Va. Code Ann. § 11-10-16(b) (West 2010)

9. “[T]he fact that parties disagree about the meaning of a statute does not itself create ambiguity or obscure meaning.” Syl. Pt. 4, Davis Mem’l Hosp. v. W. Virginia State Tax Com’r, 222 W. Va. 677, 671 S.E.2d 682 (2008) (internal citations omitted).

10. “[W]here the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation” *Id.*

11. “[A] statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Id.*

12. West Virginia Code Section 11-10-16(b) is clear and unambiguous with regards to the question of whether the terms “proceeding instituted by the tax commissioner”, “utilization”, “method”, “brought” and “commenced” apply to the Tax Commissioner’s day to day duties in administering West Virginia’s tax laws.

13. Reasonable minds cannot disagree that the ten year limitations period contained in West Virginia Code Section 11-10-16(b) does not apply to administrative actions undertaken by the Tax Commissioner pursuant to West Virginia Code Section 11-10-11(j)(1).

14. The canon of statutory construction *noscitur a sociis*, states that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it. Davis Mem’l, at 689, 684 n11.

15. Assuming arguendo that West Virginia Code Section 11-10-16(b) is ambiguous, under the canon of statutory construction *noscitur a sociis*, the “other methods” contemplated by the legislature when drafting Section 16(b) are akin to “court like” actions taken by the Tax

Commissioner, like those of levy and distraint, as opposed to his or her day to day duties in administering the tax laws of West Virginia.

16. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code. R. §§ 121-1-63.1 and 69.2 (2003)

17. The Petitioner in this matter has not carried his burden of proving that the June 13, 2011 Notice of Return Change/Credit Denial was erroneous, unlawful, void or otherwise invalid.

18. Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the Notice of Return Change/Credit Denial, issued against the Petitioner on June 13, 2011, regarding \$_____ of his 2010 tax year overpayment, is hereby **AFFIRMED**.